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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
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| 10/784,637 | 02/23/2004 | Joseph P. Errico | F-270 | 8185 |
| 51640 | 7590 | 01/25/2008 | EXAMINER | |
| SPINE MP | | | PELLEGRINO, BRIAN E | |
| LERNER, DAVID, et al. | | | | |
| 600 SOUTH AVENUE WEST | | | ART UNIT | PAPER NUMBER |
| WESTFIELD, NJ 07090 | | | 3738 | |
| | | | MAIL DATE | DELIVERY MODE |
| | | | 01/25/2008 | PAPER |

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

| | | | |
|------------------------------|---------------------|---------------|--|
| Office Action Summary | Application No. | Applicant(s) | |
| | 10/784,637 | ERRICO ET AL. | |
| | Examiner | Art Unit | |
| | Brian E. Pellegrino | 3738 | |

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) Responsive to communication(s) filed on 05 November 2007.
- 2a) This action is **FINAL**. 2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) Claim(s) 1-8 and 13-24 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) Claim(s) _____ is/are allowed.
- 6) Claim(s) 1-8, 13, 16-21 and 24 is/are rejected.
- 7) Claim(s) 14, 15, 22 and 23 is/are objected to.
- 8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on _____ is/are: a) accepted or b) objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) All b) Some * c) None of:
 1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. _____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) Notice of References Cited (PTO-892)
- 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date 11/5/07.
- 4) Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) Notice of Informal Patent Application
- 6) Other: _____.

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 11/5/07 has been entered.

Claim Rejections - 35 USC § 102

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1-6 are rejected under 35 U.S.C. 102(e) as being anticipated by Landry et al. (2003/233145). Fig. 1 shows an artificial intervertebral disc with two baseplates 12', 12". Fig. 6 illustrates a coupling 14 that is disposed between the baseplates that permits articulation, see also paragraph 104. Figs. 37,41-44,47,48,55 illustrate tools for inserting the spinal devices and have tines 430, 1004,1006, 1116 respectively. It can also be seen (Fig. 1) that the baseplates have spikes 24 for securing to the vertebrae. Figs. 41-44 show the tool having a handle and that the instrument can apply force in the proximal and distal direction for insertion of the spinal implant. Fig. 37 illustrates the tool has a stop 462 to prevent over insertion. Fig. 48 illustrates the tine is tapered at its end.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 7,8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Landry et al. (2003/233145). Landry is explained *supra*. However, Landry fails to disclose the intervertebral disc has an upper baseplate with a lower surface that is flat and an upper surface of the lower baseplate being curved that corresponds with tines of the tool. It would have been obvious to one of ordinary skill in the art to alter the corresponding engagement surfaces of the tines and baseplates, since such a modification only involves routine skill in the art. Forming curved and flat contours to more closely match articulating surfaces is well within the skill of engineer developing the components.

Claims 1,4,13,16-21,24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gill et al. (6113637) in view of Landry et al. (2003/233145). Gill et al. show (Figs. 3,6) an artificial intervertebral disc with two baseplates **22,24** coupled with a single central coupling of components **30,50**. Fig. 16,17 show an insertion tool with a shaft **74** and a tine **79** at the distal end that is inserted between the baseplates and a vertebral stop **78**. However, Gill et al. fail to disclose the tool can have two tines parallel to one another for straddling the coupling. Landry et al. teach a shaft with a pair of tines to form a pocket that surrounds the baseplates. It would have been obvious to

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one of ordinary skill in the art to modify the tool of Gill and include two tines as taught by Landry for provide more control and grip of the implant for insertion purposes.

Allowable Subject Matter

Claims 14,15,22,23 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Response to Arguments

Applicant's arguments filed 11/5/07 have been fully considered but they are not persuasive. Applicant's argue that the tines of Landry do not have a central coupling between them. The Examiner is entitled to give terms in a claim its plain meaning as interpreted by one of ordinary skill in the art. It is noted that the specification must clearly set forth the definition explicitly and with reasonable clarity, deliberateness, and precision. Exemplification is not an explicit definition. Even explicit definitions can be subject to varying interpretations. See *Teleflex, Inc. v. Ficosa North America Corp.*, 63 USPQ2d 1374, 1381 (Fed. Cir. 2002), *Rexnord Corp. v. Laitram Corp.*, 60 USPQ2d 1851,1854 (Fed. Cir. 2001) and MPEP 2111.01. The Examiner does not interpret the coupling to be any special structure and thus the fact that Landry's baseplates are coupled by components between it and the tines are located outside or surrounding the coupling of the plates, the limitations are met as claimed.

Applicant's arguments with respect to claims 13,16-21,24 over Gill have been considered but are moot in view of the new ground(s) of rejection.

Conclusion

All claims are drawn to the same invention claimed in the application prior to the entry of the submission under 37 CFR 1.114 and could have been finally rejected on the grounds and art of record in the next Office action if they had been entered in the application prior to entry under 37 CFR 1.114. Accordingly, **THIS ACTION IS MADE FINAL** even though it is a first action after the filing of a request for continued examination and the submission under 37 CFR 1.114. See MPEP § 706.07(b). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

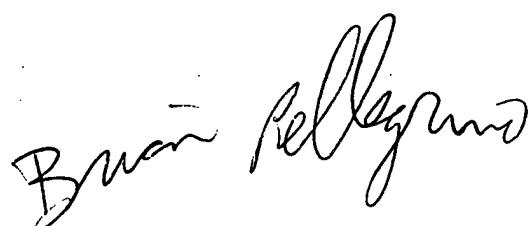
A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Brian E. Pellegrino whose telephone number is 571-272-4756. The examiner can normally be reached on M-F (7:30am-4pm).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Corrine McDermott can be reached on 571-272-4754. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

TC 3700, AU 3738



BRIAN E. PELLEGRINO
PRIMARY EXAMINER